

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Applied Communication Services, Inc.
Petition for Reconsideration and
Request for Reinstatement
Station WQMQ648 (YG)

Order

Adopted: July 29, 2013

Released: July 29, 2013

By the Assistant Chief, Mobility Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On November 5, 2012, Applied Communication Services, Inc. (Applied) filed a construction notification for Station WQMQ648, along with a request for waiver of the deadline for filing the notification. The construction deadline for the station was October 22, 2011, and the deadline for filing the required notification was November 7, 2011. The request for waiver was dismissed along with the notification on November 24, 2012, because Applied did not submit the associated filing fee for the waiver request. On March 5, 2013, Applied filed a petition seeking reconsideration of the dismissal and requesting reinstatement of its license for Station WQMQ648.

2. Also on March 5, 2013, Applied filed a request for special temporary authority (STA) to allow it to continue operating its station. That STA was granted and currently expires on September 11, 2013. For the reasons discussed below, we dismiss and deny Applied's petition. As a result, the license for Station WQMQ648 automatically terminated as of its construction deadline, October 22, 2011. We, however, authorize Applied to continue operating station facilities until the expiration date of its current STA for the purpose of discontinuing operations in an orderly manner.

II. BACKGROUND

3. Applied acquired the license for Station WQMQ648 on October 22, 2010, authorizing trunked, private carrier Industrial/Business Pool mobile relay service (YG) on ten, paired base station and mobile frequencies for a ten-year term ending October 22, 2020. Section 90.155(a) of the Commission's rules provides that all stations authorized under Part 90 of its rules, with certain exceptions inapplicable to this case, must be placed in operation within 12 months of the grant date or the authorization cancels automatically and must be returned to the Commission. The construction deadline for Station

1 Petition for Reconsideration and Request for Reinstatement, filed by Applied Communication Services, Inc. (Mar. 5, 2013) (Petition).

2 FCC File No. 0005677561, filed by Applied Communication Services, Inc. (Mar. 5, 2013).

3 The paired frequencies were 470/473.68125, 471/474.05625, 471/474.49375, 471/474.73125, 472/475.15625, 483/486.25625, 483/486.66875, 484/487.08125, 484/487.38125, and 484/487.80625 MHz.

4 47 C.F.R. § 90.155(a); see id. § 1.946(c) (providing that "[i]f a licensee fails to commence service or operations by the expiration of its construction period ..., its authorization terminates automatically (in whole or in part as set forth in the service rules), without specific Commission action, on the date the construction ... period expires");

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WQMQ648 was therefore October 22, 2011. In addition, Section 1.946(d) requires a licensee that has met its construction deadline in a timely manner to notify the Commission within 15 days after expiration of the construction period of the date(s) on which construction was completed.<sup>5</sup> The deadline for filing the required notification of construction for Station WQMQ648 was Monday, November 7, 2011.<sup>6</sup>

4. Nearly three months before the construction deadline, on July 26, 2011, the Commission's Universal Licensing System (ULS) issued letters to Applied and to Spectrum License Consultants, Inc., Applied's contact-of-record, reminding the licensee that the construction period for Station WQMQ648 was about to expire and that the licensee needed to submit a notification no later than 15 days after the construction deadline.<sup>7</sup> On October 20, 2011, Applied filed a construction notification that requested an extension of time to complete construction. In particular, Applied both certified in its filing that the date of construction would be October 22, 2011, two days after the date it filed the construction notification, and also sought a 180-day extension of time to complete construction.<sup>8</sup> Applied stated in its extension request that it "has constructed mobile relay facilities for station WQMQ648 and placed mobile units in service," but that "the facilities are not adequate to meet either [its] needs or the construction requirements of the Commission's Rules."<sup>9</sup> Applied concluded by requesting "a 180 day extension of time to complete construction and waiver of Rule 90.313(c) to allow Applied to fully load the system."<sup>10</sup>

5. Applied's construction notification requesting an extension of time to complete construction was dismissed effective October 24, 2011.<sup>11</sup> Before issuing the dismissal, Mobility Division staff contacted Applied. As the dismissal notice explains, during the discussion, Applied indicated that none of the frequencies on the license had been constructed and that the licensee needed more time to finalize construction. The dismissal notice further explained that Applied's filing was dismissed because a request for extension of time cannot be filed by submitting a construction notification, and construction notifications can only be used to report construction that has been completed. As a result, the actual date

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§ 1.955(a)(2) (providing that "[a]uthorizations automatically terminate (in whole or in part as set forth in the service rules), without specific Commission action, if the licensee fails to meet applicable construction or coverage requirements").

<sup>5</sup> *See id.* § 1.946(d) (providing that "[a] licensee who commences service or operation within the construction period ... must notify the Commission by filing FCC Form 601 [and] [t]he notification must be filed within 15 days of the expiration of the applicable construction or coverage period").

<sup>6</sup> The fifteenth day after the construction deadline for Station WQMQ648, November 6, 2011, was a Sunday. The next business day and the filing deadline was, therefore, Monday, November 7, 2011. *See* 47 C.F.R. § 1.4(j) (providing that if "the filing date falls on a holiday, the document shall be filed on the next business day"); *id.* § 1.4(e)(1) (defining "holiday" to mean, in relevant part, Saturday and Sunday).

<sup>7</sup> *Construction/Coverage Deadline Reminder Notice*, ULS Reference No. 5193323 (July 26, 2011). The reminder notices were addressed to Edward F. Leonard, Applied Communications Services Inc., 203 Southwest Cutoff, Northborough, Massachusetts 01532, and Spectrum License Consultants, Inc., 6713 Club Meadows Drive, Amarillo, Texas 79124.

<sup>8</sup> *Required Notification*, FCC File No. 0004919700, filed by Applied Communications Services Inc. (Oct. 20, 2011).

<sup>9</sup> *Id.* at Att., "Request for Extension of Time and Request for Rule Waiver."

<sup>10</sup> *Id.*

<sup>11</sup> *Notice of Dismissal*, ULS Reference No. 5238712 (Oct. 25, 2011).

of construction included in a notification must be a date that occurs before the filing date of the notification, not after.<sup>12</sup>

6. On November 21, 2011, Applied filed a second request to extend the construction deadline for Station WQMQ648, this time from October 22, 2011, to March 15, 2012.<sup>13</sup> Applied explained that it “attempted to file its request for extension of time to complete loading on October 20, 2011, ... [and that it] is again filing its request and requests waiver of the Commission’s Rules to allow acceptance of the untimely filing.”<sup>14</sup> Applied also restated that it had constructed mobile relay facilities for Station WQMQ648 and placed mobile units in service, but the facilities were inadequate to meet its needs or the Commission’s construction requirements.<sup>15</sup> In addition, even though Applied stated that it was requesting a 180-day extension of the construction deadline, a construction completion date of March 15, 2012, would have been, if granted, a 145-day extension.<sup>16</sup>

7. On February 8, 2012, ULS issued a letter returning Applied’s second extension request noting that “Applied indicates that it ‘has constructed mobile relay facilities for station WQMQ648 and placed mobile units in service.’”<sup>17</sup> The return notice therefore directed the licensee to respond within 60 days, or by April 9, 2012, by listing “the specific locations and frequencies that have been timely constructed.”<sup>18</sup> Applied amended its extension request on April 4, 2012, to explain that “station WQMQ648 was timely constructed at the authorized location,”<sup>19</sup> and more specifically that “[t]he base station frequencies timely constructed are, as follows: 470.68125, 471.05625, 471.49375, 471.73125, 472.15625, 483.25625, 483.66875, 484.08125, 484.38125, and 484.80625 MHz.”<sup>20</sup> Applied also amended its request by changing the date for which it requested an extension of time to complete construction from March 15, 2012, to March 15, 2011 – a date that preceded both the filing of its extension request by eight months and the license construction deadline by seven months.

8. While Applied amended its second extension request to list the frequencies it had

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<sup>12</sup> *Id.* In particular, the Dismissal Notice stated that “[y]our application is dismissed for the following reasons. In discussing with Mr. Black of Spectrum License Consultants and Mr. Curt Brown, an attorney; an extension of time to construct cannot be filed by submitting a Notification of construction. The Notification (NT) is used only for reporting construction that has been completed. Mr. Brown indicated that no frequencies on this filing were constructed but Applied Communications Services needed additional time to finalize construction. Therefore, a separate filing for an Extension (EX) would be required by filing a Main Form 601, Schedule L, along with an additional waiver for late filing (see Rule 1.946e). You will also be required to submit the appropriate waiver fees. If filed electronically, our system will automatically prompt you for that correct fee amount to be submitted. It should be submitted along with the application or within 10 days of the filing, otherwise the application would be dismissed.” *Id.* The Notice further explained an “[a]ctual date of construction is required and must be a valid date in mm/dd/yyyy format and cannot be a future date.” *Id.* The dismissal notices were also addressed to Edward F. Leonard, Applied Communications Services Inc., 203 Southwest Cutoff, Northborough, Massachusetts 01532, and Spectrum License Consultants, Inc., 6713 Club Meadows Drive, Amarillo, Texas 79124.

<sup>13</sup> *Request for Extension of Time*, FCC File No. 0004963508, filed by Applied Communications Services Inc. (Nov. 21, 2011) (amended Apr. 4, 2012).

<sup>14</sup> *Id.* at Att. A, “Request for Rule Waiver.”

<sup>15</sup> *Id.* at Att. B, “Request for Extension of Time and Request for Rule Waiver.”

<sup>16</sup> *Id.*

<sup>17</sup> *Notice of Return*, ULS Reference No. 5309945 (Feb. 8, 2012).

<sup>18</sup> *Id.*

<sup>19</sup> *Response to Notice of Return*, FCC File No. 0004963508, filed by Applied Communications Services Inc. (Apr. 4, 2012).

<sup>20</sup> *Id.*

constructed, it did not provide a construction date for the frequencies. Moreover, because Applied stated the license had been constructed in an extension request rather than a construction notification, ULS, once again, returned the request on September 7, 2012, directing Applied to file a construction notification indicating the dates on which the facilities were constructed, along with a request for waiver of the deadline for filing construction notifications. The return notice also explained that if the facilities were constructed in a timely manner, an extension request was not required.<sup>21</sup> Because Applied had also changed the extension date from March 15, 2012, to March 15, 2011, the return notice further informed the licensee that a new construction deadline sought in an extension request must be a date that occurs after the filing date of the request, not before.<sup>22</sup> The September 7, 2012 return notice warned Applied that if it did not respond within 60 days of the date of the notice, or by November 6, 2012, its extension request would be dismissed.<sup>23</sup>

9. On November 5, 2012, Applied filed a construction notification for Station WQMQ648, stating that the station was constructed on June 22, 2011.<sup>24</sup> Because Applied filed its construction notification one year after the filing deadline of November 7, 2011, it included a request for waiver of that deadline.<sup>25</sup> Applied stated that it was both requesting waiver of the filing deadline, and withdrawing its request for extension of time and associated request for waiver of rules related to the extension request.<sup>26</sup> The licensee explained that “[a]s a result of a misunderstanding, Applied needlessly requested an extension of time to complete construction of facilities for station WQMQ648” and “[i]n fact, the base station was constructed on all ten authorized frequencies on June 22, 2011, well within the one year provided for completion of construction.”<sup>27</sup> Unfortunately, Applied did not submit the required filing fee for its waiver request, and, as a result, both the request for waiver and associated construction notification were dismissed on November 24, 2012.<sup>28</sup> The dismissal notice was again mailed to Applied and its contact-of-record, Spectrum License Consultants, Inc.<sup>29</sup> Applied’s pending extension request was also dismissed effective November 24, 2012.<sup>30</sup>

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<sup>21</sup> *Notice of Return*, ULS Reference No. 5438564 (Sept. 7, 2012). In particular, the return notice stated, “[p]lease file a notification of construction. The notification must indicate the dates that each part of the system was constructed. Also, since the notification is not timely filed, it should include a request for waiver of Rule 1.946. If the station has been timely constructed then there is no requirement for an extension of time and this application will be dismissed.” *Id.* This return notice was once again addressed to Edward F. Leonard, Applied Communications Services Inc., 203 Southwest Cutoff, Northborough, Massachusetts 01532, and Spectrum License Consultants, Inc., 6713 Club Meadows Drive, Amarillo, Texas 79124.

<sup>22</sup> *Id.* The return notice further stated that “[t]he new Buildout/Coverage/Construction date must be a future date and in the proper format (mm/dd/yyyy).” *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Required Notification*, FCC File No. 0005478819, filed by Applied Communications Services Inc. (Nov. 5, 2012).

<sup>25</sup> *Id.* at Att. “Request for Rule Waiver, Withdrawal of Extension of Time Request and Withdrawal of Associated Rule Waiver Request” (Waiver Request and Withdrawal)

<sup>26</sup> Waiver Request and Withdrawal at 1.

<sup>27</sup> *Id.*

<sup>28</sup> *Notice of Dismissal*, ULS Reference No. 5485332 (Nov. 24, 2012). This notice explained that Applied’s construction notification was dismissed because “[i]nsufficient payment was received or no payment was received within the required time frame.” *Id.*

<sup>29</sup> The dismissal notice was addressed to Edward F. Leonard, Applied Communications Services Inc., 203 Southwest Cutoff, Northborough, Massachusetts 01532, and Spectrum License Consultants, Inc., 6713 Club Meadows Drive, Amarillo, Texas 79124.

<sup>30</sup> *Notice of Dismissal*, ULS Reference No. 5487633 (Nov. 27, 2012). The dismissal notice states that “[t]he application was not amended within 60 days of the date shown on the Notice of Application Return letter; therefore, (continued....)

10. Failure to meet a construction requirement results in automatic termination of a license.<sup>31</sup> When a construction notification deadline passes without notification from a licensee, rather than immediately allowing the license to automatically terminate, the Commission's Automated Termination (Auto-Term) procedures afford a licensee that has met its construction requirements a second and final opportunity to notify the Commission that it in fact constructed the station at issue in a timely manner. Under those procedures, absent a timely filed extension request or construction notification, ULS places the license in "termination pending" status under a presumption that the licensee did not meet the construction requirements for the station. ULS further generates a weekly public notice listing the authorizations that entered termination pending status for that week, and issues automated letters to notify licensees that their authorizations are in termination pending status.<sup>32</sup>

11. Once a license is placed in "termination pending status," the Auto-Term procedures allow those licensees that have met the construction deadline, but failed to submit a notification in a timely manner, to file a petition for reconsideration within 30 days of public notice of termination pending status with information sufficient to show that they in fact met their construction requirements in a timely manner. Failure to submit a petition within that 30-day reconsideration period with the appropriate information finalizes the automatic termination of the license effective the date of the construction deadline.<sup>33</sup> More specifically, if within 30 days after the public notice is released the licensee files a petition for reconsideration with information sufficient to show that it in fact met its construction or coverage requirement in a timely manner, the petition will be granted and ULS will subsequently change the status of the authorization to "Active," as long as the authorization is otherwise in compliance with Commission rules. If, however, by the end of that 30-day period the licensee does not rebut the presumption that it did not timely meet its construction or coverage requirement, ULS will subsequently change the status of the license, location, or frequency to "Terminated," effective the date of the construction or coverage deadline.<sup>34</sup>

12. After Applied's construction notification and extension requests were dismissed, ULS placed the license for Station WQMQ648 in "termination pending" status in accordance with the Commission's Auto-Term procedures. On November 28, 2012, ULS issued letters, again both to Applied and its contact-of-record, Spectrum License Consultants, Inc., notifying the licensee that ULS had placed the license in "termination pending" status.<sup>35</sup> The public notice listing the license for Station WQMQ648 as placed in "termination pending" status was also released on November 28, 2012.<sup>36</sup> Both the letters and

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this application is hereby dismissed." *Id.* The dismissal notice once again explained that "[t]he new Buildout/Coverage/Construction date must be a future date and in the proper format (mm/dd/yyyy)." *Id.* This dismissal notice was also addressed to Edward F. Leonard, Applied Communications Services Inc., 203 Southwest Cutoff, Northborough, Massachusetts 01532, and Spectrum License Consultants, Inc., 6713 Club Meadows Drive, Amarillo, Texas 79124.

<sup>31</sup> See *supra* note 4 and accompanying text.

<sup>32</sup> Wireless Telecommunications Bureau Announces Deployment Of "Auto-Term," The Automated Feature In Its Universal Licensing System That Identifies Unconstructed Stations Resulting in Automatic Termination of Licenses, *Public Notice*, 21 FCC Rcd 163, 163-64 (WTB Jan. 23, 2006) (*Auto-Term Public Notice*).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Construction/Coverage Deadline Notice of License Termination Pending Status*, ULS Reference No. 5488869 (Nov. 28, 2012) (WQMQ648 Termination Pending Letters). Again, two letters were issued. One was addressed to Edward F. Leonard, Applied Communications Services Inc., 203 Southwest Cutoff, Northborough, Massachusetts 01532, and the other to Spectrum License Consultants, Inc., 6713 Club Meadows Drive, Amarillo, Texas 79124.

<sup>36</sup> Wireless Telecommunications Bureau Site Based Licenses Termination Pending Public Notice, *Public Notice*, Report No. 8266 at 2 (Nov. 28, 2012) (*Auto-Term Public Notice*).

public notice explained that in accordance with Auto-Term procedures and Section 1.106 of the Commission's rules, Applied had 30 days within which to file a petition for reconsideration that included the actual construction date of the facilities. The deadline for filing the petition for Station WQMQ648 was December 28, 2012.

13. Applied, however, did not file a petition by that deadline. As a result, upon expiration of the reconsideration period for the Auto-Term process, the automatic termination of the license for Station WQMQ648 as of its construction deadline, October 22, 2011, became final. Over two months later, on March 5, 2013, Applied filed its petition for reconsideration arguing that the dismissal of its construction notification and placing its license in termination pending status were improper and requesting reinstatement of its license. Also on March 5, 2013, Applied filed its STA request to allow it to continue operating the station facilities. The STA request was granted on March 15, 2013, with an expiration date of September 11, 2013, under call sign WQQW705.

### III. DISCUSSION

14. We initially dismiss Applied's petition because it was not filed in a timely manner. Section 405(a) of the Communications Act, as implemented by Section 1.106(f) of the Commission's rules, requires that a petition for reconsideration be filed within 30 days from the date of public notice of Commission action.<sup>37</sup> Section 1.106(f) of the Commission's rules more specifically provides that a "petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of the final Commission action, as that date is defined in § 1.4(b)."<sup>38</sup> The United States Court of Appeals for the District of Columbia Circuit has consistently held that the Commission is without authority to extend or waive the statutory 30-day period for filing petitions for reconsideration specified in Section 405(a) of the Communications Act,<sup>39</sup> except where "extraordinary circumstances indicate that justice would thus be served."<sup>40</sup> We note the filing requirement of Section 405(a) of the Act applies even if the petition for reconsideration is filed only one day late.<sup>41</sup>

15. Applied argues in its petition that Commission staff improperly dismissed the November 5, 2012 construction notification before considering the substantive arguments presented in its associated request for waiver,<sup>42</sup> and that staff improperly placed the license for Station WQMQ648 into termination pending status.<sup>43</sup> Section 1.4(b)(2) of the Commission's rules provides that the date on which public notice is given for a document released by staff in a non-rulemaking proceeding is the release date of the document.<sup>44</sup> The release date of the notices dismissing Applied's construction notification and waiver request was November 24, 2012. The deadline for filing a petition seeking reconsideration of that

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<sup>37</sup> 47 U.S.C. § 405(a).

<sup>38</sup> 47 C.F.R. § 1.106(f).

<sup>39</sup> See *Reuters Ltd. v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986); *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976).

<sup>40</sup> See *Reuters*, 781 F.2d at 952 (holding that express statutory limitations barred the Commission from acting on a petition for reconsideration that was filed after the due date); *Gardner*, 530 F.2d at 1091 (excepting where "extraordinary circumstances indicate that justice would thus be served").

<sup>41</sup> See, e.g., *Panola Broadcasting Co.*, *Memorandum Opinion and Order*, 68 F.C.C. 2d 533 (1978) (dismissing a petition for reconsideration that was filed one day after the statutorily allotted time for filing requests for reconsideration); *Metromedia, Inc. Memorandum Opinion and Order*, 56 F.C.C. 2d 909 (1975) (same).

<sup>42</sup> Petition at 1-2.

<sup>43</sup> *Id.* at 2-3.

<sup>44</sup> 47 C.F.R. § 1.4(b)(2).

action under Section 1.106 of the Commission's rules was therefore December 26, 2012.<sup>45</sup> Section 1.4(b)(4) provides that the date on which public notice is given of a document entitled "Public Notice" is the date on which the public notice is released.<sup>46</sup> The letters and public notice listing the license for Station WQM648 as placed into terminated pending status were released on November 28, 2012. The deadline for filing a petition seeking reconsideration under Section 1.106 of the Commission's rules and in accordance with the Commission's Auto-Term procedures was therefore December 28, 2012. Both reconsideration periods expired over two months before Applied filed its petition on March 5, 2013.

16. Applied, however, argues that the reconsideration period in this proceeding began on Sunday, February 3, 2013, the internal system date on which ULS changed the status of the license for Station WQM648 under its Auto-Term procedures from "Termination Pending" to "Terminated."<sup>47</sup> Applied argues that the petition was therefore filed in a timely manner on March 5, 2013.<sup>48</sup> We disagree. As the Commission has previously explained, the final action taken under its Auto-Term procedures is the weekly public notice listing those authorizations that have been placed into termination pending status.<sup>49</sup> After the reconsideration period has expired, ULS changes the status of a license from Termination Pending to either Active or Terminated, but the Commission does not provide public notice of the date on which that change is made.

17. The Wireless Telecommunications Bureau (Bureau) explained this process in its public notice announcing the deployment of Auto-Term. In relevant part, the Bureau stated that "as the Commission explained in its *ULS Report and Order*, if the licensee does not confirm that it met its deadline, the license termination process becomes final at the end of the confirmation process. In the absence of a timely filed petition for reconsideration, the license termination becomes final and the Auto-Term process ends on the 30th day following release of the weekly 'Termination Pending' public notice for those licenses, locations, and frequencies listed in the public notice that were placed into Termination Pending status that week."<sup>50</sup>

18. The Bureau further explained that the Commission does not issue public notice of the date on which ULS changes the status of a license from Termination Pending to Terminated and the final action taken under its Auto-Term procedures is the public notice placing licenses into Termination Pending status:

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<sup>45</sup> The thirtieth day after dismissal of Applied's waiver request and construction notification was December 24, 2012. Monday, December 24, 2012, and Tuesday, December 25, 2012, however, were Federal Holidays. The next business day and filing deadline for a petition seeking reconsideration of the dismissal of Applied's waiver request and construction notification was Wednesday, December 26, 2012. See 47 C.F.R. § 1.4(j) (providing that if "the filing date falls on a holiday, the document shall be filed on the next business day").

<sup>46</sup> *Id.* § 1.4(b)(4).

<sup>47</sup> Petition at 1.

<sup>48</sup> *Id.*

<sup>49</sup> As the Commission stated in its *ULS Report and Order* when it adopted its construction notification requirement, "we are enhancing our procedures," in part, by providing "that when the Commission fails to receive timely confirmation of construction from the licensee, ULS will generate a letter to the licensee and issue a public notice *thirty days before the termination becomes final.*" In the Matter of Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Report and Order*, 13 FCC Rcd 21027, 21076, ¶ 106 (1998) (emphasis added) (adopting 47 C.F.R. § 1.946(d)). The Commission further explained that "[o]nce that thirty-day period has elapsed, without notification from the licensee, the license will then be available for the Commission to reassign by competitive bidding or other means according to the rules of the particular service." *Id.*

<sup>50</sup> *Auto-Term Public Notice*, 21 FCC Rcd at 168.

If, . . . , no petition is filed by the end of the 30-day period, or if a timely petition is denied by the Bureau, ULS will change the status of the license or license component to ‘Terminated,’ effective the date of construction or coverage deadline. This action, changing the status of the authorization from Termination Pending to Terminated is part of the automated process. The Bureau will not release a public notice listing authorizations that have undergone the status change to Terminated under Auto-Term. As already explained, the only public notice generated under this process is the weekly ‘Termination Pending’ public notice listing licenses or license components that have been placed in Termination Pending status.<sup>51</sup>

19. Rather than simply allowing licenses to terminate automatically where a licensee initially fails to comply with its construction notification requirements, the Commission adopted its Auto-Term process to afford those licensees a second and final opportunity to retain licenses constructed in a timely manner. The weekly “Termination Pending” public notice is the final Commission action from which a licensee may seek reconsideration of the presumption that its station facilities were not constructed in a timely manner. Absent the filing of a petition in a timely manner that demonstrates a licensee has complied with its construction requirements, the automatic termination of the license becomes final on the day the Auto-Term reconsideration period expires. The automated internal system date on which ULS changes the status of a license from Terminated Pending to Terminated does not constitute final Commission action, does not require public notice, and does not trigger an additional reconsideration period. As already explained, the date of final Commission action for which notice was provided under its Auto-Term procedures in this case was November 28, 2012, triggering a 30-day reconsideration period ending December 28, 2012. The internal ULS system date of Sunday, February 3, 2013, does not constitute Commission action for the purpose of triggering yet another reconsideration period under either Section 1.106 of the Commission’s rules or its Auto-Term procedures.

20. Finally, the Court of Appeals, in *Gardner*, created a narrow exception to the statutory filing period, which allows the Commission to extend or waive the 30-day filing period only in “extraordinary circumstances.”<sup>52</sup> The Court in *Gardner*, however, expressly limited its holding to the highly unusual circumstances presented by the case “where the late filing is in some sense attributable to a procedural violation by the Commission.”<sup>53</sup> The instant case is similar to *Stephen E. Powell*, where the Commission denied an application for review because Powell failed to file his petition for reconsideration within the 30-day period required by statute, and did not demonstrate that his failure to do so was because of extraordinary circumstances.<sup>54</sup> Powell argued that he did not recall receiving the decision that was mailed to him notifying him of the cancellation of his construction permit and, as a result, staff had failed to provide notice to him.<sup>55</sup> The Commission rejected Powell’s argument, concluding that the Commission made every reasonable effort to contact Powell and to apprise him of its actions in connection with the permit.<sup>56</sup> In particular, the Commission found that staff “did exactly what the *Gardner* court required; it

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<sup>51</sup> *Id.* at 169.

<sup>52</sup> *Gardner*, 530 F.2d at 1091.

<sup>53</sup> *Id.* Under *Gardner*, the petitioner has the burden to show (a) when and how the petitioner received notice in fact, (b) that the time remaining was inadequate to allow the petitioner reasonably to meet the 30-day requirement of Section 405, and (c) that the petitioner moved for reconsideration promptly on receiving actual notice. *Id.* at 1091, n.24.

<sup>54</sup> Stephen E. Powell For Construction Permit For a New Commercial FM Station on Channel 293A, 106.5 MHz WRHF(FM), Farmington, New Hampshire, *Memorandum Opinion and Order*, 11 FCC Rcd 11925, 11925, ¶ 1 (1996).

<sup>55</sup> *Id.* at 11926, ¶ 4.

<sup>56</sup> *Id.* at 11927, ¶ 6.

gave notice of its decision to the petitioner” by sending a copy of the decision to Powell’s mailing address.<sup>57</sup> Moreover, notice of the Commission’s actions with respect to the cancellation of Powell’s construction permit was included in a weekly broadcast action public notice.<sup>58</sup>

21. As in *Powell*, Commission staff in this proceeding made every reasonable effort to apprise Applied of their actions in connection with Applied’s license for Station WQMQ648. ULS issued two notices dated November 24, 2012 – one to the licensee and the other to its contact-of-record – dismissing Applied’s waiver request and construction notification. ULS also issued two letters dated November 28, 2012 – again, one to the licensee and the other to its contact-of-record – warning Applied that its license for Station WQMQ648 had entered termination pending status. In addition, notice of the license entering termination pending status appeared on a weekly public notice also dated November 28, 2012. Applied has not attempted to show that its late filing is attributable to a procedural violation by the Commission. In fact, Applied has not even acknowledged that it did not file its petition in a timely manner. Accordingly, we dismiss the petition for reconsideration as late-filed.

22. Even if we did not dismiss Applied’s petition as filed in an untimely manner, we would deny the petition because Applied never paid the fee associated with its request for waiver. Applied argues that its waiver request was properly filed, that Commission staff erred by not considering the arguments presented in that request, and because staff did not consider the arguments, they improperly dismissed the construction notification and placed the license in termination pending status.<sup>59</sup> In particular, Applied contends that “it is not reasonable to require the preparation and filing of a petition for reconsideration of a Commission action which is based on a Commission failure to read a document which has been properly submitted.”<sup>60</sup> Applied concludes that “[t]he Commission should take responsibility for the errors of its staff and disregard the fact that Applied did not request consideration of those errors or request reconsideration of an unjust and unreasonable notice of termination.”<sup>61</sup>

23. As already discussed, we are without authority to “disregard” Applied’s failure to seek reconsideration in a timely manner of the notice dismissing its waiver request and construction notification or of the placement of its license in termination pending status. Commission staff is similarly without authority to consider the substantive arguments in a request for waiver when the filer does not submit the associated fee in a timely manner. Section 8 of the Communications Act requires the Commission to collect fees for certain applications pursuant to a Schedule of Application Fees, as adjusted for inflation,<sup>62</sup> including requests for waivers related to private carrier licenses.<sup>63</sup> The Communications Act further provides that “[t]he Commission may dismiss any application or other filing for failure to pay in a timely manner any application fee or penalty under this section.”<sup>64</sup> Section 1.1118(a) of the Commission’s rules implements that statutory provision by providing that filings

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<sup>57</sup> *Id.* (citing *Gardner*, 530 F.2d at 1091).

<sup>58</sup> *Id.* Notice of the Commission’s actions was included in Broadcast Applications, *Public Notice*, Report No. 23530 (rel. June 16, 1995).

<sup>59</sup> Petition at 2-3.

<sup>60</sup> *Id.* at 2.

<sup>61</sup> *Id.* at 2-3.

<sup>62</sup> 47 U.S.C. § 158.

<sup>63</sup> *Id.* § 158(g).

<sup>64</sup> *Id.* § 158(c).

subject to fees and accompanied by defective fee submissions will be dismissed where the defect is discovered within 30 calendar days from the receipt of the filing.<sup>65</sup>

24. Applied submitted its waiver request on November 5, 2012, and the request was dismissed within 30 calendar days of that date on November 24, 2012, because Applied did not submit the fee for its waiver request. In fact, Applied states in its petition that it “cannot confirm that it paid the filing fee for the waiver request,” ... but that it “is certainly willing to pay the filing fee immediately to resolve the matter expeditiously.”<sup>66</sup> Applied further contends that it “is unlikely not to have paid the fee” because “in its more than 20 years as a licensee ..., Applied has never failed to pay the filing fee in a timely manner.”<sup>67</sup> Licensees must comply with Commission rules at all times. Whether Applied previously paid fees in a timely manner neither mitigates nor cures the fact that it did not pay the requisite fee for its November 5, 2012 waiver request. Because Applied did not pay the fee, the request for waiver was properly dismissed without staff review. Absent grant of Applied’s waiver request, its construction notification was also dismissed as late-filed, having been submitted one year after the deadline for filing the notification. Because Applied does not have on file a construction notification for Station WQMQ648 that we can process, the license automatically terminated as of its construction deadline, October 22, 2011.

25. Finally, Applied argues that “[r]einstating the license for station WQMQ648 would not affect the Commission’s ability to dispose of the TV-shared spectrum as directed by Congress.”<sup>68</sup> Applied further contends that “the geographic area covered by station WQMQ648 was not available for reallocation either at the time of the enactment of Section 6103 of the Middle-Class Tax Relief and Job Creation Act of 2012 or at the time of the Commission’s erroneous dismissal of Applied’s notification of construction.”<sup>69</sup> Applied concludes that “[r]einstating the license for station WQMQ[648] will maintain the stability of the areas and amounts of spectrum available.”<sup>70</sup> We reiterate that Applied’s construction notification was properly dismissed, resulting in the automatic termination of its license for Station WQMQ648. We also acknowledge that the Commission has suspended, until further notice, the acceptance and processing of certain Part 90 applications operating in the 470-512 MHz band.

26. On April 26, 2012, the Wireless Telecommunications and Public Safety and Homeland Security Bureaus (Bureaus), under delegated authority, announced in a public notice that they were implementing, effective immediately and until further notice, a limited suspension of the acceptance and processing of certain applications for Part 22 and Part 90 services operating in the 470-512 MHz spectrum band (T-Band) to stabilize the existing spectrum landscape.<sup>71</sup> The Bureaus further explained in the public notice that they were suspending the acceptance and processing of T-Band applications, including, in relevant part, applications for new licenses, that, if granted, would tend to increase the degree to which

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<sup>65</sup> 47 C.F.R. § 1.1118(a). The rule section provides that “[f]ilings subject to fees and accompanied by defective fee submissions will be dismissed under § 1.1111(d) of this subpart where the defect is discovered by the Commission’s staff within 30 calendar days from the receipt of the application or filing by the Commission.” *Id.*

<sup>66</sup> Petition at 2.

<sup>67</sup> *Id.*

<sup>68</sup> Petition at 3.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Wireless Telecommunications Bureau and Public Safety and Homeland Security Bureau Suspend the Acceptance and Processing of Certain Part 22 and 90 Applications for 470-512 MHz (T-Band) Spectrum, *Public Notice*, 27 FCC Rcd 4218, 4218 (WTB 2012) (*Suspension Public Notice*).

the 470-512 MHz band was currently licensed.<sup>72</sup> Requests for waiver of that suspension, however, may be entertained. The Bureaus expressly noted that “potential applicants may have recourse to the waiver provisions in Section 1.925 to request an exception to the filing and processing freeze.”<sup>73</sup> We note the Bureaus further warned that “[p]arties filing such a request should carefully review the rule’s criteria for a waiver and must provide complete support, including but not limited to documentation, demonstrating that they meet the criteria set out in the rule.”<sup>74</sup>

#### IV. CONCLUSION

27. In this case, Applied submitted a construction notification before the deadline, but the filing both certified a construction date that would take place after the filing date and requested a 180-day extension of time to complete construction of Station WQMQ648. After the notification was dismissed, the licensee submitted a second request seeking an extension of the construction deadline initially from October 22, 2011, to March 15, 2012, and later amending the new extension construction date to March 15, 2011. That extension request was returned to the licensee, after which Applied submitted a notification stating that it had in fact completed construction of the station facilities in a timely manner, on June 22, 2011. Because that notification was submitted after the filing deadline, Applied sought waiver of the deadline, but failed to submit the requisite fee along with the request for waiver. As a result, Applied’s request for waiver and associated construction notification were dismissed, as well as the licensee’s second pending extension request. Once the construction notification and extension request were dismissed, the license for Station WQMQ648 was placed in termination pending status. Because Applied’s petition was filed after the statutory deadlines for seeking reconsideration of either action, we dismiss the petition as untimely filed. In addition, even if filed in a timely manner, we deny the petition because Applied never submitted the requisite fee associated with its request for waiver of the deadline for filing construction notifications.

28. We will, however, grant Applied authority to operate on the spectrum associated with Station WQMQ648 until the expiration of its current STA. We find that it is in the public interest to provide Applied with the opportunity to make arrangements to discontinue its station operations in an orderly manner. We therefore authorize Applied to operate under its STA, call sign WQQW705, until September 11, 2013. If Applied needs additional time to complete an orderly discontinuance of operations, it may file a request to renew its STA pursuant to Section 1.931 of the Commission’s rules, for up to an additional 90 days, together with the appropriate filing fee. If Applied does not request additional special temporary authority, it will no longer be authorized to provide further service and shall cease any and all operations no later than September 11, 2013. Applied shall notify the Mobility Division that it has stopped operations and shall provide the date upon which its operations ceased.

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<sup>72</sup> *Id.* at 4219. The Bureaus stated that “[e]ffective immediately and until further notice, the Bureaus will not accept or process (1) applications for new licenses; (2) applications that seek to modify existing licenses by adding or changing frequencies or locations; (3) applications that seek to modify existing licenses by changing technical parameters in a manner that expands the station’s spectral or geographic footprint, such as, but not limited to, increases in bandwidth, power level, antenna height, or area of operation; and (4) any other application that could increase the degree to which the 470-512 MHz band currently is licensed.” *Id.* The Bureaus issued an additional public notice on June 7, 2012, offering clarifications after receiving inquiries from interested parties seeking further guidance. Wireless Telecommunications Bureau and Public Safety and Homeland Security Bureau Clarify Suspension of the Acceptance and Processing of Certain Part 22 and 90 Applications for 470-512 MHz (T-Band) Spectrum, *Public Notice*, 27 FCC Rcd 6087 (WTB 2012) (*Clarification Public Notice*).

<sup>73</sup> *Suspension Public Notice*, 27 FCC Rcd at 4220, n.4.

<sup>74</sup> *Id.* The Bureaus reiterated in their *Clarification Public Notice* that “[p]arties whose applications are subject to the filing and processing suspension, as clarified above, may seek a waiver of the suspension pursuant to Section 1.925 of the Commission’s rules. Parties seeking a waiver must provide a showing that they meet the waiver criteria in Section 1.925.” *Clarification Public Notice*, 27 FCC Rcd at 6088 (citing 47 C.F.R. § 1.925).

**V. ORDERING CLAUSES**

29. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 303(r), and 405 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), 405, and Sections 0.131, 0.331, and 1.106 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331, 1.106, the petition for reconsideration filed on March 5, 2013, by Applied Communication Services, Inc. in association with the license for Station WQMQ648 IS DISMISSED.

30. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 303(r), and 405 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), 405, and Sections 0.131, 0.331, 1.106, 1.1118 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331, 1.106, 1.1118, the petition for reconsideration filed on March 5, 2013, by Applied Communication Services, Inc. in association with the license for Station WQMQ648 IS DENIED.

31. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 303(r), and 309(f) of the Communications Act, as amended, 47 U.S.C. §§ 4(i), 303(r), 309(f), and Sections 0.131, 0.331, and 1.931 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331, 1.931, the Mobility Division shall allow Applied Communication Services, Inc. special temporary authority to operate on the spectrum previously authorized under the license for Station WQMQ648 up to September 11, 2013, the current expiration date of its special temporary authorization under call sign WQQW705.

FEDERAL COMMUNICATIONS COMMISSION

Cyndi Thomas  
Assistant Chief, Mobility Division  
Wireless Telecommunications Bureau